

not in terms of a number of channels, but rather in terms of the number of hours of video programming available on the satellite per day ("equivalent hours per day").<sup>51</sup>

A reasonable figure for triggering the Section 25(b) requirements for Part 25 satellites would be 120 equivalent hours per day of video capacity devoted to DBS.<sup>52</sup> This trigger level would yield a minimum set-aside of 8 equivalent hours per day, a usable block of capacity for noncommercial programming.

**D. No Phase-In Period Is Needed**

In 1993, some parties argued that the requirements of Section 25(b) should be delayed in view of the nascent stage of the DBS industry. APTS explained in its 1993 reply comments that delay would be inconsistent with the provisions of Section 25(b). See 1993 APTS Reply Comments, at pp. 3-6. The point applies with even greater force today. In view of the successful commercial development experienced by DBS in only a few short years of existence, there can be no argument for delay. Even potential DBS entrants cannot claim the need for a phase-in of the set-

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<sup>51</sup> See the proposed regulatory language at page 40, supra, for the definition of the term "equivalent hours per day."

<sup>52</sup> This obligation should attach when a DBS provider has the capacity to make 120 equivalent hours per day available for video programming directly to the home, regardless of whether it is actually programming those hours. Similarly, the Commission should aggregate the use of a Part 25 satellite system by multiple DBS operators in determining whether 120 equivalent hours per day of video programming are provided directly to the home. Licensees and others providing DBS service on Part 25 satellites should not be permitted to avoid Section 25(b) requirements by declining to provide programming a few hours a day to multiple DBS services, none of which offers

aside requirement. In order to be competitive, any future entrant will necessarily begin operations with a large number of channels. Thus, new entrants should have no difficulty in making seven percent of their channel capacity available for noncommercial programming suppliers.

In 1993, the Commission asked whether existing DBS programming contracts should be grandfathered, thereby postponing implementation of the noncommercial set-aside requirements until expansion of a system's channel capacity. 1993 Notice at ¶ 40. There is clearly no basis for such grandfathering. Grandfathering existing commercial programming contracts would further delay and frustrate Congress's goal of providing the public with access to noncommercial programming sources. The Commission should interpret Section 25(b) as pre-empting existing contracts for DBS capacity where such contracts interfere with implementation of the set-aside.

Particularly in view of the passage of time since enactment of Section 25(b), there can be no claim of unfairness that would justify grandfathering. Commercial programming suppliers cannot now argue that they were not on notice of the Section 25(b) requirements. DBS operators have been aware of these requirements for more than four years and can reasonably be expected to have provided adequate contingencies in their

commercial programming contracts to cover the noncommercial set-aside.<sup>53</sup>

**E. DBS Providers Should Be Able to Utilize Unused Channel Capacity Until the Noncommercial Program Supplier Is Ready to Furnish the Programming**

Section 25(b)(2) provides that the DBS provider should be permitted to utilize unused noncommercial capacity. The Commission in 1993 requested comment on whether the DBS provider's ability to use this capacity should terminate upon the mere signing of an agreement between the DBS provider and the noncommercial programming supplier, or when the noncommercial entity actually furnishes the programming. 1993 Notice at ¶ 45. The latter interpretation is more consistent with the language of the statute and with Congress's intent.

Section 25(b)(2) provides that the DBS operator may utilize unused noncommercial capacity "pending the actual use of such channel capacity" for noncommercial programming. "Actual use" ordinarily signifies the commencement of operations, not the mere signing of an agreement. Moreover, Congress implicitly recognized in enacting Section 25(b)(2) that there is no benefit in allowing scarce satellite capacity to remain unused. Congress's underlying intent would be frustrated if the DBS

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<sup>53</sup> If the Commission nevertheless should conclude that grandfathering is warranted for some existing contracts, only those contracts executed prior to the date Section 25(b) was enacted should be eligible for grandfathering. In addition, the Commission should allow grandfathering only of the initial term of those contracts. In cases where contracts provide for renewal terms, or contain automatic "evergreen" clauses, grandfathering the contracts during such extended terms could substantially thwart the implementation of Section 25(b).

provider were required to relinquish capacity before the noncommercial entity was ready to provide programming.

Of course, once the noncommercial program supplier is ready to furnish programming, it must be afforded prompt access to the capacity. As a predicate to this obligation, a DBS provider should be given reasonable notice that a noncommercial program supplier will exercise its rights under Section 25(b). A requirement that a noncommercial program supplier provide at least 30 days' notice of its intention to use the reserved channel capacity strikes a reasonable balance of the parties' interests. It permits those who wish to offer limited program services that will not need much lead time, such as a specific seminar or educational forum, to gain access to DBS promptly. Thirty days should give the DBS provider ample time to make any adjustments needed to accommodate the noncommercial use.

**VIII.      The Commission Should Refrain From Prescribing How  
Section 25(b) Capacity Should Be Allocated Among  
Qualified Noncommercial Entities at This Time**

The implementation of Section 25(b) raises questions about how set-aside time should be allocated in the event that demand by qualified noncommercial entities exceeds supply.<sup>54</sup> In 1993, it appeared that disputes about allocation of the noncommercial capacity might develop, and APTS suggested the creation of an Advisory Committee to make recommendations on a formal

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<sup>54</sup> The Commission has not explicitly sought comment on the allocation issue. However, some parties made proposals regarding allocation in their 1993 comments, and the Commission presumably will find it appropriate to make some statement on this issue.

mechanism to deal with such conflicting demands. See 1993 APTS Comments at pp. 30-31. APTS commented that, pending the resolution of allocation issues by an Advisory Committee, the DBS provider should have the discretion to select among qualified noncommercial entities. See 1993 APTS Reply Comments at p. 23.

In the years since 1993, developments in the DBS industry have eased the concern over potential conflicts in allocation of DBS capacity. As noted above, it now appears that there will be a limited number of DBS systems, all with substantial capacity. Most significantly, advances in compression technology have led to substantial increases in DBS capacity, and competitive pressures will inevitably require all DBS operators to offer more than 100 channels.<sup>55</sup> See pages 3-4 & note 4, supra. Particularly if the Commission establishes a 7 percent set-aside requirement applicable to all DBS systems, there will be a substantial amount of capacity available for noncommercial use under Section 25(b). At the same time, it is uncertain how many noncommercial entities will actually seek to use the reserved capacity. In part, this will depend on what revenue sources are available to support acquisition of DBS distribution rights for the noncommercial programming, or to help defray the charges that some noncommercial program suppliers will have to pay to DBS providers.

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<sup>55</sup> For example, the ASkyB DBS service promises to deliver at least 500 subchannels over its 50 DBS channels, based on a 10:1 compression ratio. See Broadcasting & Cable (Mar. 3, 1997), p. 42.

In these circumstances, there may be no significant conflict over use of the reserved capacity and thus no need to establish allocation criteria or a formal mechanism to settle allocation issues. It therefore would be advisable for the Commission to refrain from establishing any such allocation criteria or mechanism at this time. If any allocation issues should develop, the reserved capacity is most likely to be used in a productive manner if the DBS provider has the discretion to choose the noncommercial entity or entities to which the reserved capacity will be made available.<sup>56</sup> At least in the short term, allowing DBS providers to select from among the qualified noncommercial entities is likely to be the method least burdensome for DBS providers and the Commission.

In the period after the Commission issues its rules implementing Section 25(b), it will become apparent whether the demand for reserved capacity exceeds the supply. Assuming it institutes a reporting requirement (as recommended at pages 34-36 above), the Commission will gain information about the nature of any conflicts over allocation of the reserved capacity. If significant allocation conflicts should develop, the Commission at some later date can make a better informed decision concerning

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<sup>56</sup> While the DBS provider should have the discretion to select the noncommercial program suppliers, and to negotiate with those suppliers for blocks of programming, the provisions of Section 25(b)(3) prohibiting the DBS provider from exercising editorial control over the programming distributed over the reserved capacity preclude the DBS provider from selecting specific programs that are to be included or excluded.

whether the rules should be modified to establish allocation criteria or an allocation mechanism.<sup>57</sup>

The Commission should also plan to revisit the allocation issue as technological developments change the nature of DBS. In view of the fast-moving evolution of this technology, it is important that the Commission take a dynamic approach to rulemaking in this area. This is essential to ensure that the regulations continue to fulfill Congress's intent as the technological capabilities of DBS service continue to improve.

In particular, if localized transmission on DBS becomes a reality, the Commission should require that some portion of the set-aside capacity be used to carry locally-oriented services supplied by qualified noncommercial entities (to the extent the DBS service in question has localized transmission capabilities). This regulation would be in addition to any general public interest requirement that DBS operators provide subscribers with some locally-oriented programming. See pages 52-53, infra.

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<sup>57</sup> The Commission should encourage representatives of the DBS industry and of national educational programming suppliers to consult informally about how any disputes regarding allocation of the reserved capacity should be resolved. These representatives may be able to develop mutually acceptable guidelines for resolution of conflicts, making it unnecessary for the Commission to promulgate rules on the subject. Alternatively, the Commission may eventually be able to use recommendations formulated by these representatives in developing allocation rules.

**IX. By Its Terms, Section 25(a) Does Not Impose Section  
312(a)(7) Obligations on Noncommercial Programming Suppliers**

The Commission in 1993 requested comment on whether noncommercial programming suppliers using reserved channel capacity should be required to comply with the political broadcasting requirements to be imposed on DBS providers under Section 25(a). 1993 Notice at ¶ 41. By its terms, Section 25 does not impose these requirements on noncommercial programming suppliers.

Section 25(a) requires the Commission to adopt rules to impose public interest or other requirements on "providers of direct broadcast satellite service." Similarly, Section 25(b) imposes the requirement to make capacity available for noncommercial programming on a "provider of direct broadcast satellite service." Congress thus clearly intended that both the public interest obligation (including the political broadcasting requirements) and the obligation to make capacity available to noncommercial programming suppliers would apply to the same entity: a provider of DBS service. The statutory language makes clear that noncommercial programming suppliers are not considered providers of DBS service for purposes of either Section 25(a) or Section 25(b).

Moreover, Section 25(b)(5)(A) defines a "provider of direct broadcast satellite service" as either the licensee under Part 100 of the Commission's rules or a "distributor who controls a minimum number of channels" used for DBS service under Part 25 of the Commission's rules. Noncommercial programming suppliers



do not fit either of these definitions. Accordingly, under the express terms of Section 25, noncommercial programming suppliers are not subject to the public interest obligations referred to in Section 25(a), including political broadcasting requirements.

This interpretation comports with Congress's goal in enacting Section 25(b). Given the limited amount of capacity required to be reserved for noncommercial use and the vast number of candidates (perhaps as many as 1,000 or more in a given election year) who could request time under Section 312(a)(7),<sup>58</sup> requiring noncommercial programming suppliers to give federal candidates reasonable access to their DBS capacity could effectively preclude the intended use of that capacity for educational purposes.

The potential adverse effect of applying Section 312(a)(7) to the noncommercial set-aside capacity would be magnified if the Commission also concluded that noncommercial programming suppliers may not charge candidates for the use of the time. Without the requirement that candidates pay for use of capacity, the limited noncommercial capacity could be completely diverted to political purposes during election periods, thereby entirely undermining the congressional purposes underlying

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<sup>58</sup> During normal congressional election years, approximately 870 main party candidates for the House of Representatives plus an additional 66 main party candidates for the Senate -- for a total of 936 candidates -- would be eligible for reasonable access time. A substantially greater number of candidates for the nomination of the Democratic or Republican party, as well as legally qualified candidates from other parties, would also be eligible.

Section 25(b). However, the Commission need not reach this issue, since it is clear that Congress did not intend the political broadcast rules to apply to noncommercial DBS users.

**X. Other Issues Arising Under Section 25(a)**

The Commission has asked whether public interest requirements other than those mentioned specifically under Section 25(a) should be imposed on DBS providers. 1997 Notice, p. 2; 1993 Notice at ¶ 29. Both broadcasters and cable operators are subject to various public interest requirements. Particularly in view of the rapid commercial development of DBS, there is no reason to exempt DBS operators from public interest obligations.

APTS and PBS particularly encourage the Commission to comply fully with Congress's mandate in Section 25(a) to consider whether there are opportunities for localism on DBS. Public broadcasting is built on a bedrock of localism and is committed to the preservation of local broadcast service. While many problems facing Americans may be global or national in scope, many of their greatest concerns are local and tied to the communities in which they live. DBS may pose a threat to local broadcast television, since it permits nationwide distribution of programming and enjoys economies of scale that might adversely affect the economic base of local television stations.

If the Commission concludes that localized transmission on DBS has become technologically feasible, it should take steps to facilitate the deployment of such technology. If localized

transmission on DBS becomes a reality, the Commission should consider imposing on DBS providers a public interest requirement to provide some amount of locally-oriented programming. Such a requirement would assure that the DBS "broadcast" medium responds to the local concerns of the American public.

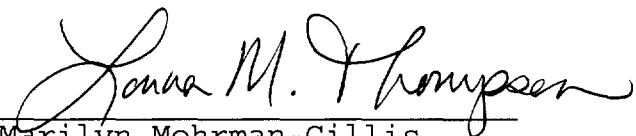
**XI. Conclusion**

For the foregoing reasons, the Commission should promulgate DBS regulations consistent with the proposals described above.

Respectfully submitted,

Of Counsel

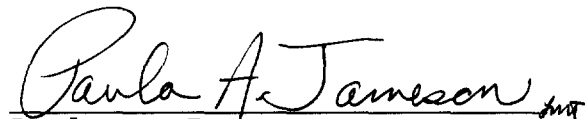
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